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No. 08-838

Supreme Court, U.S.
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In The Supreme Court of the United States

NAVEEN JAIN and ANURADHA JAIN,
Petitioners,

v.

J.P. MORGAN SECURITIES, INC., WILSON SONSINI GOODRICH & ROSATI, P.C., and PERKINS COIE, LLP,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

REPLY BY NAVEEN AND ANURADHA JAIN IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. New Points Raised in Opposition Briefs

The following new points or issues were raised in the Opposition Briefs of Respondent Perkins Coie, LLP ("Perkins"), J. P. Morgan Securities, Inc. ("Morgan") and Wilson Sonsini Goodrich & Rosati, P.C. ("Wilson"), and are addressed here pursuant to Rules of the Supreme Court of the United States, Rule 15-6.

1. Perkins makes the new argument that this Court lacks jurisdiction under the "adequate state grounds" doctrine; *i.e.*, that the state court's judgment can be upheld under state law proximate cause principles. Perkins Brief, pp. 1, 9-14. But the Washington Court of Appeals decided this case only on federal law grounds—the applicability of a federal policy of no "indemnity" for "securities law violators." The Superior Court issued no written ruling on causation, and declined to incorporate its oral comments into the written ruling.

However, the admissions in Respondents' Briefs that the District Court erred in its 16(b) rulings against the Jains—the core of Respondents' proximate cause argument—clearly implicate the conflict in federal law over applying a "no-indemnity" policy to state law claims by innocent or merely negligent plaintiffs against those whose negligence caused their securities liability.

Under *Michigan v. Long*, 463 U.S. 1032 (1983), because the state court decision rests on or, at the very least, is interwoven with questions of federal law, the Court has jurisdiction over this matter.

2. Wilson makes the new argument that federal courts uniformly define allegedly prohibited "de facto indemnity" by evaluating whether the damages claimed overlap with, or consist of, the underlying securities liability. Wilson Brief, pp. 14-18. Wilson does not acknowledge the conflict between the Tenth and Fourth and other Circuits on this issue, and bases its argument largely on inapplicable settlement bar cases (such as *In re Heritage Bond Litigation*, 546 F.3d 667 (9th Cir. 2008)).

3. Morgan makes the new argument that "Petitioners cannot state an indemnity claim under Washington law unless they admit Section 16(b) liability." Morgan Brief, pp. 16, 22. Because the Jains were *held* liable, they are entitled to recover the resulting damages in proportion to the fault of those who caused that judgment. But because Respondents now admit that the federal District Court *erred in its 16(b) holdings* against the Jains, the Court is squarely presented with the issue of whether an anti-indemnity policy should immunize negligent securities professionals from the damage they inflicted on a fault-free or, at most, negligent client. The Jains, who have satisfied any disgorgement requirement of 16(b) even assuming they were actually liable, should be permitted to establish Respondents' responsibility for the entry of a $247 million judgment against them.

II. "Independent and Adequate State Grounds"

Perkins argues that state proximate cause principles are an independent and adequate state law ground to deny the Petition. Perkins Brief, pp. 1, 9-14. The Washington Court of Appeals decision that is the subject of the Jains' Petition, however, does not address those causation issues, nor does any written order of the Superior Court.

In determining the basis on which a judgment rests, the Supreme Court

> seeks answers to two closely related but conceptually different questions: (1) Is the judgment *based upon* a state ground that is independent and free of entanglement with the federal question? (2) Is that state ground adequate to support the judgment? If both questions are answered in the affirmative . . . , the Supreme Court's jurisdiction fails.

Gressman et al., *Supreme Court Practice* at 209 (9th ed. 2007) (hereafter, *Supreme Court Practice*) (citations omitted) (emphasis added).

The independence of an alleged state ground must be "apparent from the four corners of the opinion." *Id.* at 217 (citing to *Michigan v. Long*, 463 U.S. 1032 (1983)).

In *Long*, the Supreme Court established a presumption that is applicable here:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

463 U.S. at 1041-42.

The Court of Appeals decision here is not "based on" any state law principle; proximate cause is not even mentioned. In any event, Perkins' remand argument is based on outdated, pre-*Long* case law including *Herb v. Pitcairn*, 324 U.S. 117 (1945). *Long* specifically disapproved of

> [t]he varying practices of (a) vacating and remanding the case to the state court for clarification, or (b) vacating and remanding for such further proceedings as might be appropriate, or (c) continuing the case so that counsel might apply to the state court for amplification, amendment, or certificate that would clarify the basis of the judgment (*Herb v. Pitcairn*, 324 U.S. 117 (1945)); . . . .

Supreme Court Practice, p. 216 (citations omitted).

Perkins also argues that the Jains are not entitled to recover their attorneys' fees and costs under the "ABC rule." Perkins Brief, pp. 8-9. Washington's ABC rule has no bearing on the Jains' claims for their $68 million payment to settle the 16(b) judgment or their $10 million in investment losses incurred to collateralize a supersedeas bond, forestalling greater losses from a fire sale of their assets based on the erroneous 16(b) judgment. The Jains do not seek review of the appellate ruling on their attorneys' fees and costs.

III. Conflicts among Federal Cases Regarding Damage-Based Analysis to Identify "Indemnity" Claims

In its Response Brief, Wilson argues that there is no conflict justifying review because "all Circuit Courts use a damages-based analysis to identify *de facto* or disguised indemnity claims." Wilson Brief, p. 14. Wilson is wrong. It mischaracterizes the Fourth Circuit case, *Baker Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 19898), as a case using "damages-based analysis," and thus overlooks the conflict between *Baker Watts* and *First Golden Bancorporation v. Weiszmann*, 942 F.2d 726 (10th Cir. 1991). Wilson Brief, pp. 16-17.

In fact, the Jains' claims fall squarely within the principle adopted in *Baker, Watts* but rejected by the Tenth Circuit in *First Golden*. In *Baker, Watts*, plaintiff, a "securities wrongdoer,"[1] sued a law firm based on its "independent duty" under state law to

[1] 876 F.2d at 1102.

provide "competent legal representation,"[2] seeking to recover all or part of plaintiff's $1,916,314.17 in securities liability.[3] The Fourth Circuit declined to dismiss this fault-based contribution claim,[4] holding that doing so would "confer an absolute immunity" on the law firm and could "ironically preclude a negligent offender from seeking contribution under state law from an intentional wrongdoer."[5] That the damages sought were all or part of the plaintiff's securities liability was no bar to recovery.

Otherwise, Wilson relies mainly on settlement bar cases, including *Heritage Bond Litigation*, 546 F.3d 667 (9th Cir. 2008), *Gerber v. MTC Electronic Technologies Co.*, 329 F.3d 297 (2d Cir. 2003), and *AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305 (11th Cir. 2004). These cases, to the extent that they are relevant at all, are consistent with the Jains' claims. But they have no bearing on the issue of relevant conflicts among federal courts.

The settlement bar cases *correctly* bar fault-based claims against settling defendants *because* they have paid to settle those claims *and* the non-settling defendant is credited with the full measure of the settling defendants' actual responsibility for the losses. *In re Heritage Bond Litigation*, 546 F.3d at 679 (allowing "disguised claims for contribution

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[2] *Id.* at 1108

[3] *Id.* at 1103.

[4] *Baker, Watts* was decided six years before the United States Congress, in the Private Securities Litigation Reform Act of 1995, codified an express right to contribution. 15 U.S.C. § 78u-4(f)(8).

[5] *Id.* at 1108.

and indemnity" would allow a non-settling defendant to "make an end run around a settlement agreement"). Because any non-settling defendant is credited with the full proportionate fault of the settling defendants—not merely with the amount of the settlement—by definition any claim by the non-settlor for a sum in excess of that credit, based on the non-settlor's securities liability, *must be* for "indemnity": i.e., the non-settlor must be seeking recovery for losses over and above those resulting from the settlors' fault. This rule merely underscores the merit of the Jains' claims, which seek only to allocate damages according to the proportionate fault of negligent securities professionals.

Respondents have paid no part of the Jains' 16(b) liability, and the Jains have received no "credit" against that liability for Respondents' negligence. Rather than presenting "settlement bar" questions, this case presents the classic issue of whether a party who was innocent, or at most negligent (and has discharged its own liability, if any), can recover for losses resulting from securities liability in proportion to the fault of others in creating that liability.

Here, the Jains resolved their liability by a $68 million payment, satisfying the 16(b) "disgorgement" requirement; the 16(b) judgment at most establishes that they were liable without fault; and in fact, as Respondents now admit, they never should have been held liable at all. That the "damages" the Jains seek are the same as their 16(b) liability is no bar to their recovery, to the extent that those damages are the fault of Respondents.

The Jains' claims are not "contribution" claims only because Respondents cannot be liable under 16(b). But for purposes of the "no-indemnity" analysis, they are equivalent. They are fault-based claims that foster diligence on the part of securities professionals and protect clients from their negligence. *See Fromer v. Yogel*, 50 F. Supp.2d 227, 237-38 (S.D.N.Y. 1999) (upholding a fault-based state law claim where the plaintiff was not jointly liable and thus could not seek "contribution"). The New York law claim in *Fromer*[6] is akin to the Jains' Washington law claim;[7] both are based on disproportionate fault—here, between a strictly liable plaintiff and negligent defendants. Because of the absence of joint liability, they are not "contribution" claims, but they serve the very same policies that have led to federal approbation for contribution claims.

Several District Court cases outside the settlement bar context have expressly rejected classifying a fault-based claim as a prohibited *de facto* indemnity claim simply because the damages sought consisted of the plaintiff's securities liability. These decisions presumably reflect the law in the respective Circuits.

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[6] That claim was for "implied-in-law indemnity," applicable when "there is a great disparity in the fault of two tortfeasors, and one of the tortfeasors is held liable for a loss primarily the responsibility of the other." *Fromer*, 50 F. Supp. 2d at 240.

[7] *Sabey v. Howard Johnson*, 101 Wn. App. 575, 5 P.3d 730 (2000) (recognizing "common law indemnity" claims against professional firm by one held liable without fault).

In *In re Cendant*, 139 F. Supp.2d 585 (D.N.J. 2001), the New Jersey District Court rejected the contention that a no-indemnity policy barred state law claims simply because the damages sought were the sum paid in settlement of securities claims:

> [M]erely because Cendant's tort and contract claims seek to recover damages that could be recoverable in a state law indemnity action do[es] not convert these claims into impermissible indemnity claims under the federal securities laws. Rather, they are independent, non-indemnity claims that are neither barred nor preempted by the federal securities laws.

Id. at 596.

The same point was made in *In re Cenco,* 642 F. Supp. 539 (N.D. Ill. 1986), in which an auditor sought to recover as an element of tort (fraud) damages, sums paid in settlement of a securities class action:

> The gist of Seideman's fraud claim is . . . that Cenco has committed a tort on Seidman, and must pay damages for this, damages which happen to encompass the settlement payment. That this element of damage *overlaps* what Seideman maybe could have recovered through indemnity does not *make it* indemnity.

Id. at 542.

The Eastern District of Pennsylvania federal court applied the same principle in *In re Sunrise*, 793 F. Supp. 1306 (E.D. Pa. 1992):

> The damages that the non-settling defendants seek for their tort and contract claims are similar, although not identical, to the damages that they seek for their indemnification claims. *Such an overlap does not necessarily transform the claims into claims for implied indemnity.*

Id. at 1321.

As characterized by Wilson, the Tenth Circuit's decision in *First Golden*—the only Circuit Court 16(b) decision on the no-indemnity issue—conflicts with *Baker v. Watts* and with *In re Sunrise, In re Cenco, In re Cendant* and *Fromer*. Wilson argues that in *First Golden*, the controlling question was "whether the damages sought were measured by the underlying securities liability." Wilson Brief, p. 15. The Tenth Circuit's inquiry was whether a claim was "simply 'liability over' [in contrast to] those claims that ask for independent affirmative relief against the third-party defendants." 942 F.2d at 731. In other words, *First Golden* held that a claim was a prohibited "indemnity" claim because it sought damages consisting of securities liability.

The *First Golden* Court also held that the insider's claim conflicted with 16(b)'s disgorgement policy, but cited only one 16(b) case for this proposition: *Bunker Ramo-Eltra Corp v. Fairchild*

Ind., Inc., 639 F. Supp. 409 (D. Md. 1986).[8] *Bunker-Ramo* correctly held that policy to be inconsistent with *contractual* indemnity *by the issuer*. There is no federal policy reason to bar claims by fault-free or merely negligent insiders against securities professionals whose negligence created the transactions that led to 16(b) liability without the insider's knowledge or authority.

IV. The Jains Are Entitled to Pursue "Indemnity" Claims Because They are Fault-Free, as Respondents Now Admit

The Jains' claims are not for "indemnity": *i.e.*, they do not seek to shift damages to Respondents in excess of Respondents' allocable share of fault in creating the Jains' securities liability. However, even if the label "indemnity" could properly apply to the Jains' claims, such claims should be allowed because the Jains allege that they are fault-free, and Respondents now admit that the Jains were wrongly held to have violated 16(b).

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[8] *Bunker Ramo-Eltra* held that if indemnification were "found to be valid, then the defendants would have been able to waive, in effect, the requirement of section 16(b) since they would not have to return the short-swing profits back to the plaintiff issuer." 630 F. Supp. at 415. This focus on potential indemnification *by the issuer* is also reflected in *Schaffer v. CC Invs., LDC*, 286 F. Supp. 2d 279, 282-83 (S.D.N.Y. 2003), and *In re XO Communications, Inc.*, 330 B.R. 394, 427-30 (S.D.N.Y. 2005) (relying on *Schaffer*). Where, as here, the transactions held to constitute violations of 16(b) resulted from the negligence of securities professionals, and any 16(b) liability has been satisfied by the insider, the principles of *In re Cenco*, *In re Cendant*, and *In re Sunrise* should apply.

Wilson states, for example, that because the District Court erred, "the Jains should not have had to disgorge any amount to InfoSpace." Wilson Brief, pp. 9-10. It also states at 9:

> Any harshness suffered by the Jains resulted . . . from the District Court's erroneous damage and liability analyses.

Perkins argues that the Ninth Circuit would have held that the Jains realized no short-swing profits—*i.e.*, the entire judgment would have been reversed. Perkins Brief, p. 7. *See also* Morgan Brief, p. 16, n.6.

Respondents' admissions confirm that this case must be decided on the basis that the Jains are innocent plaintiffs wrongly held to have violated Section 16(b). The Jains' claims should be treated at least as favorably as claims by those who have not "committed a sin graver than ordinary negligence." *See, Globus v. Law Research Service, Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969); *Greenwald v. American Medcare Corp.*, 666 F. Supp. 489, 493 (S.D.N.Y. 1987) (party "entitled to an opportunity to prove that he was without fault and is therefore entitled to indemnity").

As the *Fromer* court noted, the Seventh Circuit, in *King v. Gibbs*, 876 F.2d 1275 (7th Cir. 1989), apparently would preclude recovery on an "indemnity" claim[9] even by a fault-free plaintiff, but

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[9] The *King* court implicitly recognized fault-based state law claims, which is the correct characterization of the Jains' claims. 876 F.2d at 1279, n. 5. But if the Jains' claims are treated as "indemnity" claims, according to *Fromer*, the Second and Seventh Circuits potentially differ on whether a fault-free

the "Second Circuit has not yet adopted this view." 50 F. Supp. 2d at 238, n. 8. *Fromer* allowed a so-called "indemnity" claim that, under New York law, was based on disproportionate fault ("great disparity in the fault of two tortfeasors," or "implied-in-law indemnity"). 50 F. Supp. at 240. The Jains were held strictly liable--the 16(b) judgment does not establish fault. Under a Washington cause of action called "common law indemnity,"[10] which like the New York claim in *Fromer* is based on disproportionate *fault*, the Jains are entitled to recover in proportion to Respondents' fault.

No federal policy against "indemnity" in favor of "securities law violators" should bar a claim by a fault-free plaintiff held strictly liable because of the negligence of securities professionals.

V. Conclusion

There is no uniform federal policy defining as prohibited "indemnity" any claim to recover damages for securities law liability. There is substantial authority recognizing that holding securities professionals accountable for their negligence is salutary. There is no rational basis for applying a different rule to 16(b) cases, where liability does not even imply fault. Where the insider has satisfied 16(b)'s disgorgement requirement, and alleges innocence, neither the disgorgement nor the deterrence policy of 16(b) is implicated: one cannot

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plaintiff can advance the claim.

[10] The Washington case recognizing this cause of action also involved a plaintiff held strictly liable because of the negligence of a professional firm. *Sabey v. Howard Johnson*, 101 Wn. App. 575, 5 P.3d 730 (2000).

be deterred from being the victim of others' negligence.

DATED this 17th day of February, 2009.

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